

229320

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

APR 19 2011

Part of
Public Record

M&G POLYMERS USA, LLC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42123

**CSX TRANSPORTATION, INC.'S RESPONSE TO M&G POLYMERS USA, LLC'S
WITHDRAWAL OF OPPOSITION TO BIFURCATION REQUEST AND MOTION TO
MODIFY PROCEDURAL SCHEDULE**

Defendant CSX Transportation, Inc. ("CSXT") respectfully submits this Response to Complainant M&G Polymers USA, LLC's ("M&G's") April 15, 2011 pleading withdrawing M&G's opposition to an expedited determination of market dominance and proposing a procedural schedule for the Board to determine market dominance in this litigation. CSXT agrees that the Board should expedite its consideration of market dominance, for the reasons detailed in CSXT's January 27, 2011 Motion for Expedited Determination of Jurisdiction Over Challenged Rates ("January 27 Motion"). CSXT submits this brief Response to reiterate the compelling grounds for bifurcation of market dominance evidence set forth in the January 27 Motion and to propose a slight alteration to the expedited procedural schedule proposed by M&G.

M&G states that it is withdrawing its opposition to CSXT's Motion to expedite consideration of market dominance evidence because the Board granted a similar motion by CSXT in *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42121 (Apr. 5, 2011) ("TPP"). Indeed, this case presents at least as strong, if not even stronger, grounds

for bifurcation of market dominance evidence than existed in *TPI*. As in *TPI*, M&G “has utilized truck transportation for some of the commodities at issue and can utilize trucks for some issue traffic.” *Id.* at 6. CSXT’s January 27 Motion demonstrated both that “PET is readily transportable by truck” and that “M&G could substantially expand its capacity to load trucks at its Apple Grove facility at minimal expense.” January 27 Motion at 1-2. CSXT further presented evidence of feasible and cost-effective truck and rail-truck alternatives for most of the issue traffic volume. *See id.* at 8-14. At the very least, the evidence proffered in CSXT’s January 27 Motion “raise[s] considerable doubt that [CSXT] possesses market dominance over some of the traffic at issue.” *TPI*, STB Docket No. 42121, at 6 (Apr. 5, 2011). Because of these considerable doubts, and because of the likelihood that a finding that CSXT does not have market dominance over some of the lanes at issue could substantially simplify this case, bifurcation is amply warranted. *See id.* at 7.

M&G’s proposed procedural schedule for submission of market dominance evidence (set forth at page 3 of its Motion) proposes to alter the procedural schedule so that M&G would file its market dominance evidence on June 6 (three-and-a-half weeks before the date M&G’s evidence is due under the current schedule) and CSXT would file its reply market dominance evidence less than one month later on July 5. Therefore, while M&G would be filing its market dominance evidence almost a year after it filed its complaint and nearly six months after the close of discovery, CSXT would have less than a month to analyze M&G’s evidence and to prepare and finalize CSXT’s own reply evidence. CSXT respectfully submits that one month is not sufficient time for CSXT to prepare an effective reply to evidence that M&G has had many months to develop, particularly since the outside CSXT experts and counsel who will be developing CSXT’s reply evidence for M&G currently are occupied preparing CSXT’s market

dominance evidence in *TPI*.¹ For this reason, CSXT believes that it needs at least 60 days to prepare reply market dominance evidence in *M&G*. CSXT shares the Board's desire to expedite rate reasonableness cases and respectfully submits that permitting CSXT 60 days to file its reply market dominance evidence in *M&G* (less than half the amount of time the Board had previously allowed for preparation of reply SAC evidence) is reasonable and necessary to permit a full examination of the market dominance issues in both *TPI* and *M&G*.²

* * *

For the foregoing reasons and those set forth in CSXT's January 27, 2011 Motion for Expedited Determination of Jurisdiction Over Challenged Rates, the Board should hold the rate reasonableness phase of this proceeding in abeyance and set a procedural schedule requiring the parties to submit market dominance evidence on an expedited basis. CSXT respectfully requests that the Board adopt the following procedural schedule for submission of market dominance evidence:

M&G opening evidence on market dominance	June 6, 2011
CSXT reply evidence on market dominance	August 5, 2011
M&G rebuttal evidence on market dominance	September 6, 2011

¹ While CSXT has some reservations about its ability to prepare reply market dominance evidence under the one-month schedule the Board has ordered in *TPI*, at this time CSXT believes that the *TPI* schedule should be manageable, although CSXT of course reserves the right to revisit the point after it has reviewed TPI's May 5 opening evidence on market dominance.

² CSXT would ask for one additional clarification: namely that the Board make clear whether it expects its expedited market dominance determination in *M&G* to encompass both qualitative market dominance evidence and the quantitative jurisdictional threshold (like in *TPI*), or whether evidence will be limited to qualitative market dominance evidence.

Respectfully submitted,



G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Kathryn R. Barney
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Counsel to CSX Transportation, Inc.

Dated: April 19, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2011, I caused a copy of the foregoing Response to M&G Polymers USA, LLC's Withdrawal of Opposition to Bifurcation Request and Motion to Modify Procedural Schedule to be served on the following parties by electronic mail and postage prepaid or more expeditious means of delivery:

Jeffrey O. Moreno
Sandra L. Brown
David E. Benz
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036


Eva Mozena Brandon